U.S. Department of Labor

Board of Alien Labor Certification Appeals
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Issue Date: 19 January 2007

BALCA Case No.: 2005-INA-200
ETA Case No.: P2004-NJ-02508232

In the Matter of:

CONFIDENT CARE CORPORATION,
Employer,

on behalf of

VASILII MOISEEV,
Alien.

Certifying Officer: Dolores DeHaan[1]
New York, New York

Appearance: Elena Orliouskouva, Director
Pro Se for the Employer

Before: **Burke, Chapman and Vittone**
Administrative Law Judges

DECISION AND ORDER

PER CURIAM. This case arises from an Employer's request for review of the denial by a U.S. Department of Labor Certifying Officer ("CO") of its application for labor certification. Permanent alien labor certification is governed by section 212(a)(5)(A) of the Immigration and Nationality Act, 8 U.S.C. §1182(a)(5)(A), and Title 20, Part 656 of

[1] Ms. DeHaan was the Certifying Officer who denied the application. The Employment and Training Administration subsequently transferred responsibility over applications filed in New York prior to the effective date of the "PERM" regulations to its Philadelphia Backlog Processing Center.

the Code of Federal Regulations ("C.F.R.").[2] We base our decision on the record upon which the CO denied certification and the Employer's request for review, as contained in the appeal file ("AF"), and any written arguments. 20 C.F.R. §656.27(c).

STATEMENT OF THE CASE

The Employer is a health care facility. On January 8, 2002, it filed an application for alien employment certification on behalf of the Alien, Vasilii Moiseev, to fill the position of Coordinator. (AF 198-199). The job to be performed was described as:

> Coordinates work between health care staff and administrative personnel. Develops and directs education and promotion programs for orientation and training personnel and service of community. Formulates and directs activities to promote prevention of health disorders, alcohol and drug abuse, overweight problem and metabolism distinction, to enhance smoking cessation, nutrition and fitness. Assists individuals to understand concepts of health environment.

The Employer required a Ph.D. in Medical Sciences and two years of experience in the job offered.

The State Workforce Agency (SWA) requested additional information or changes by letter dated April 5, 2004, citing a prevailing wage issue, objections to the required degree and the fact that it did not appear the Alien had the experience required prior to hire. (AF 185-192). Based on the Employer's response, the prevailing wage issue was found to be resolved. Noting that the Alien had two years of experience in the related occupation as Coordinator, the Employer added "2 years of related occupation" to its experience requirement. (AF 180-184).

[2] This application was filed prior to the effective date of the "PERM" regulations. *See* 69 Fed. Reg. 77326 (Dec. 27, 2004). Accordingly, the regulatory citations in this decision are to the 2004 edition of the Code of Federal Regulations published by the Government Printing Office on behalf of the Office of the Federal Register, National Archives and Record Administration, 20 C.F.R. Part 656 (Revised as of Apr. 1, 2004), unless otherwise noted.

A Notice of Findings (NOF) was issued by the CO on October 28, 2004, approving a Request for Reduction in Recruitment for the position, but advising that several issues needed to be addressed. (AF 176-179). The CO found that the Employer's requirement of a Ph.D. in Medical Sciences was restrictive as it is not conferred in the U.S. and appeared to be excessive, restrictive, highly unusual and tailored to the Alien. The Employer was instructed to substitute a U.S. equivalent for the degree requirement in ETA form 750A item 14 and to document the business necessity for such a requirement. The CO also found the Employer's experience requirement to be restrictive as it did not appear that the Alien had the experience required at the time of hire, and the Employer failed to specify what it meant by a related occupation. The Employer was instructed to document that the Alien had the required qualifications at the time of hire or submit evidence why it is not feasible to hire a worker with less than the qualifications presently required.

In rebuttal, the Employer stated that it had attained an industry-wide reputation and that in order to provide qualified health services to the community it is a business necessity to hire a Coordinator with a Ph.D. degree. The Employer also submitted a letter showing two years of prior experience for the Alien as a Chief Specialist, Medical Doctor – Coordinator. (AF 147-175).

A second NOF was issued by the CO on February 15, 2005 reiterating the fact that the Employer's requirement of a Ph.D. in Medical Sciences was restrictive as it is not conferred in the U.S. and that it appears restrictive, highly unusual and tailored to the Alien. The Employer was again instructed to substitute a degree conferred in the U.S. and to document its business necessity for the requirement. The CO also noted that the Employer had failed to identify the related occupation and that there was no number in the box in item 14 of the ETA 750A quantifying the amount of such experience. Hence, noting that the Employer's rebuttal documented that the Alien had two years and two months of experience working for the Ministry of Health of the Ukraine prior to hire, and that the duties were not the same as those described in ETA form 750A item 13, the CO determined that the Alien did not meet the Employer's stated minimum requirement. The

Employer was again instructed to document that the Alien had the required qualifications at the time of hire or submit evidence why it is not feasible to hire a worker with less than the qualifications presently required. (AF 142-146).

In rebuttal, the Employer stated that when it started in business it only had one location in Hackensack, New Jersey, but that it now has seven locations including one in Florida. The Employer argued that due to this increase in business, and in order to provide qualified health services and maintain its industry-wide reputation for excellent service, it is necessary for it to hire a Health Care-Coordinator. (AF 137-141).

An additional (and final) NOF was issued by the CO on April 12, 2005. (AF 130-135). Citing the fact that the job description appeared to entail both staff training and community outreach and that the application contained limited details on these activities, the Employer was instructed to document that a bona fide position exists for the job offered. The Employer was again instructed to substitute a degree conferred in the U.S. and to document its business necessity for the requirement. The Employer was again advised that "2 years related occupation" is not an occupation, and instructed the Employer to specify the minimum requirements necessary for performance of the job. The CO directed the Employer to document that the Alien met those qualifications at the time of hire or that it is not now feasible to hire a worker with less than the qualifications presently required.

In rebuttal, the Employer stated that when the Alien was first hired it had only one location but now has expanded to eight. The Employer submitted quarterly payroll reports, employees' resumes, schedules of classes for staff training, and an outline of the training program to document the bona fides of its position. The Employer also submitted a letter from a Board Certified Credits Evaluator stating that the U.S. equivalent of the Employer's required Ph.D. in Medical Science Degree would be a Ph.D. in Health Systems Administration, and that while most of the several hundred institutions that offer this degree do so at the bachelor and/or masters degree level, six institutions offer this degree at the doctoral level. (AF 41-129).

A Final Determination denying labor certification was issued by the CO on May 27, 2005. (AF 37-40). The CO found the evidence sufficient to establish that a bona fide position exists, but concluded that the Employer had failed to adequately document its actual minimum requirements for the position or that the Alien met those requirements. In her determination to deny certification, the CO observed that while the Employer's rebuttal showed that there are U.S. institutions of higher learning that offer a degree that is equivalent to the Employer's required degree, the Employer failed to substitute the equivalent in its requirements. Moreover, she noted that the Employer had not demonstrated that any other employees in any of its eight branches are required to possess such a degree or that business necessity drives the requirement. The CO noted that the Employer never defined its alternative experience requirement, but simply removed it. Finally, the CO found that the Alien failed to meet the Employer's stated minimum experience requirement at the time of hire and that the Employer failed to show why it is not possible to offer a U.S. worker similar training.

The Employer filed a Request for Review by letter dated June 30, 2005, and the matter was referred to this Office and docketed on August 26, 2005. (AF 1-13). Employer filed a Brief in support of its position on September 26, 2005.

DISCUSSION

The regulation at 20 C.F.R. § 656.21(b)(2) states that the employer must document that the requirements for the job opportunity, unless adequately documented as arising from business necessity, are those normally required for the performance of the job in the United States. In order to establish "business necessity" an employer must show that the requirement bears a reasonable relationship to the occupation in the context of the employer's business and that the requirement is essential to performing, in a reasonable manner, the job duties as described. *Information Industries, Inc.,* 1988-INA-82 (Feb. 9, 1989)(*en banc*). Section 656.21(b)(5) provides that an employer must

document that the requirements for the job opportunity are the minimum necessary for the performance of the job and that it has not hired nor is it feasible to hire workers with less training and/or experience. Section 656.20(c)(8) requires that the job opportunity be clearly open to any qualified U.S. worker.

In the instant case, the Employer was advised in multiple NOF's that its educational requirement appeared restrictive, highly unusual and tailored to the Alien. The Employer was repeatedly advised that its degree requirement was objectionable because it was not one conferred in the U.S., nor was it a normal requirement for the job duties described. The Employer was instructed to substitute a degree conferred in the U.S. and to document business necessity for the requirement. The Employer did neither.

The Employer submitted documentation stating that the U.S. equivalent of the Employer's required Ph.D. in Medical Science Degree would be a Ph.D. in Health Systems Administration, but retained its degree requirement of a Ph.D. in Medical Science.

The Employer states that its company has attained an industry-wide reputation for excellent service and asserts that a need to maintain that reputation constitutes its business necessity for the hiring of a Health Care-Coordinator. (AF 137). The Employer also states that the Alien beneficiary has been instrumental in helping to grow the company. (AF 43). However, although the Employer asserts that it is a business necessity to hire a Coordinator with a Ph.D. "in order to provide qualified health services to the community" and that the degree is "essential to perform the job duties in a reasonable manner," the Employer's assertion alone does not establish these facts. (AF 147). The Employer has provided no documentation whatsoever in support of its assertion. Although a written assertion constitutes documentation that must be considered under *Gencorp*, 1987-INA-659 (Jan. 13, 1988)(*en banc*), a bare assertion without supporting reasoning or evidence is generally insufficient to carry an employer's burden of proof.

The Employer initially required two years of experience in the job offered. When the SWA cited the Alien's lack of the experience required prior to hire, the Employer added "2 years of related occupation" to its experience requirement. The CO repeatedly instructed the Employer to clarify the "related occupation:"

> In setting out his alternative experience requirement, the employer fails to identify the related occupation and there is no number in the box in item 14 of ETA form 750 A that would quantify the amount of such experience that would satisfy employer's alternative requirement. **"2 years related occupation: is not an occupation and neither is pre-medical school.** (AF178, 144, 133).

The Employer never defined the acceptable related occupation/s alternative requirement, but instead deleted it. Hence, as was noted by the CO, the Alien's work prior to hire by the Employer fails to meet the Employer's stated minimum requirement of two years in the job offered.

The Employer has not shown that the Alien meets the stated minimum requirements for the position, nor has the Employer shown that it is not feasible to hire a worker with less than the qualifications presented. On this basis we conclude that labor certification was properly denied.

In its Request for Review, the Employer indicated a willingness to amend its requirements to accept a person with an MBA in Health Care Management and two years of experience. Rebuttal evidence first submitted with the Request for Review, however, is not part of the record and cannot be considered on appeal pursuant to 20 C.F.R. § 656.27(c); *Atlantic Sales, Inc.,* 1988-INA-349 (Aug. 22, 1989)(*en banc den recon).* The burden of proof in the labor certification process is on the employer. 20 C.F.R. § 656.2(b); *Information Industries, Inc.,* 1988-INA-82 (Feb. 9, 1989)(*en banc*). Moreover, as was noted in *Carlos Uy III,* 1997-INA-304 (Mar. 3, 1999)(*en banc*), "[u]nder the regulatory scheme of 20 C.F.R. Part 24, rebuttal following the NOF is the employer's last chance to make its case. Thus, it is the employer's burden at that point to perfect a record that is sufficient to establish that a certification should be issued." *Uy, supra* at 8.

ORDER

The Certifying Officer's denial of labor certification is hereby **AFFIRMED**.

Entered at the direction of the panel by:

A

Todd R. Smyth
Secretary to the Board of
Alien Labor Certification Appeals

NOTICE OF OPPORTUNITY TO PETITION FOR REVIEW: This Decision and Order will become the final decision of the Secretary unless within 20 days from the date of service, a party petitions for review by the full Board of Alien Labor Certification Appeals. Such review is not favored, and ordinarily will not be granted except (1) when full Board consideration is necessary to secure or maintain uniformity of its decisions, or (2) when the proceeding involves a question of exceptional importance. Petitions must be filed with:

Chief Docket Clerk
Office of Administrative Law Judges
Board of Alien Labor Certification Appeals
800 K Street, N.W., Suite 400
Washington, D.C. 20001-8002

Copies of the petition must also be served on other parties, and should be accompanied by a written statement setting forth the date and manner of service. The petition shall specify the basis for requesting full Board review with supporting authority, if any, and shall not exceed five double-spaced typewritten pages. Responses, if any, shall be filed within ten days of the service of the petition, and shall not exceed five double-spaced typewritten pages. Upon the granting of the petition the Board may order briefs.